

Ahmed (Migration) [2021] AATA 5669 (4 June 2021)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Liban Abdi Ahmed
VISA APPLICANT:	Mr Mahamud Sheikh Aydid Guled
CASE NUMBER:	1901090
DIBP REFERENCE(S):	BCC2014/2037122
MEMBER:	Linda Holub
DATE:	4 June 2021
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Provisional) (Class UF) visa.

Statement made on 4 June 2021 at 3:39 pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – bogus document – false Police clearance certificate – member of the family unit – compassionate or compelling circumstances affecting an Australian citizen – financial hardship – mental health issues – emotional impact on family – decision under review affirmed

LEGISLATION

*Migration Act 1958, ss 5, 65, 359
Migration Regulations 1994, Schedule 2, cls 309.311, 309.321, 309.323; Schedule 4, Public interest Criterion 4020; r 1.03*

CASES

*Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Kaur v MIBP [2017] FCAFC 184
Plaintiff M64/2015 v MIBP [2015] HCA 50
Trivedi v MIBP [2014] FCAFC 42*

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

- 1) This is an application for review of a decision made by a delegate of the Minister for Immigration on 26 November 2018 to refuse to grant the applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
- 2) The applicant applied for the visa on 19 August 2014. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.309.323 of Schedule 2 to the Migration Regulations 1994 (the Regulations) the delegate having considered all the information put forward found that the secondary applicant has given a bogus document in support of this visa application, specifically relating to his Kenya Police clearance certificate. On that basis, the delegate found that the secondary applicant has provided a bogus document to the Department, the delegate found that the secondary applicant does not meet PIC 4020 (1) for the purposes of clause 309.323 (a) of Schedule 2 to the Regulations. In considering compelling or compassionate circumstances which may exist the delegate found there is no information provided that indicates compelling circumstances affecting the interests of Australia. Because the applicant was not satisfied that there are compelling circumstances that have been presented that affect the interests of Australia or any compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen that would justify the grant of this visa, the delegate found that the secondary applicant does not satisfy PIC 4020(4) and did not waive the requirements of PIC 4020(1).

BACKGROUND

- 3) The review applicant was born in 1981. He obtained Australian citizenship by grant in October 2004. He first came to Australia in 1997. He sponsored his wife, Ms Zahar Sheikh Guled for a partner visa. Ms Guled was granted a Subclass 309 (Partner (Provisional)) visa on 19 August 2014. She arrived in Australia in 20 April 2016 and has not departed Australia since then.
- 4) The visa applicant before the Tribunal currently constituted is Mr Mahamud Sheikh Aydid Guled. He is the review applicant's brother in law. He is a Somali national born in 1998. Department records indicate that the visa applicant has not travelled to Australia before. He was included in Ms Guled's partner visa application along with his brother Mr Kamal Sheikh Aydid Guled.
- 5) On 1 December 2015, the delegate made the decision to refuse to grant the visa to the secondary applicants because they found that they were not members of the family unit of Ms Guled as required for the purpose of cl.309.311 and cl.309.321 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
- 6) The family lodged a review of this decision on 29 April 2016. On 16 May 2018, the Tribunal (differently constituted), remitted the application for a Partner (Provisional) (Class UF) visa by Mr Mahamud Sheikh Aydid Guled for reconsideration with the direction that he meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: cl.309.311 of Schedule 2 to the Regulations and cl.309.321 of Schedule 2 to the Regulations. The Tribunal affirmed the decision not to grant Mr Kamal Sheikh Aydid Guled, a Partner (Provisional) (Class UF) visa. The previous Tribunal noted that they were unable to establish that Mr Kamal Sheikh Aydid Guled was a member of Ms Zahar Sheikh Guled's family unit.

- 7) On 26 November 2018 the delegate refused to grant the visa to the current visa applicant on the basis that he did not satisfy the requirements of cl.309.323 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because he submitted a fraudulent police clearance letter. Therefore, he not satisfy PIC 4020.

3. HEARING ARRANGEMENTS

- 8) On 22 September 2020, the Tribunal scheduled a telephone hearing on 8 October 2020 at 8:30 (NSW) time. The Tribunal postponed the hearing until 26 November 2020. as the Tribunal made an error by miscalculating the time zones.
- 9) The Tribunal made two attempts to call the visa applicant, but they were unsuccessful.
- 10) Initially the review applicant indicated that he did not require an interpreter. However, an interpreter was arranged for use by the visa applicant in the event the Tribunal sought to take oral evidence from him. During the course of the hearing the first hearing, the review applicant decided to utilise the interpreter. There were some technical issues in the connection with the interpreter during the first hearing. In addition, the review applicant raised concerns about the interpreting. The Tribunal decided on that basis to adjourn the hearing and resume at a later date with a different interpreter.
- 11) For the hearing on 27 January 2020 the Tribunal sourced the assistance of a different NAATI accredited Level 2 interpreter in the Somali and English languages. Following a phone call and email informing the Tribunal that the review applicant's wife was in labour, the Tribunal postponed the hearing at the review applicant's request.
- 12) The review applicant next appeared before the Tribunal on 5 May 2021 via video link using the Microsoft Teams application to give evidence and present arguments.
- 13) The Tribunal hearing was conducted with the assistance of an interpreter in the Somali and English languages. The review applicant was represented in relation to the review by his registered migration agent who participated in both hearings.
- 14) For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

- 15) The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.309.323 for the grant of the visa. Broadly speaking, this requires that:
- there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and

- neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
- 16) The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.
- 17) The Department's Decision Record states that the Department conducted background checks to verify the Kenyan Police clearance certificate presented by the visa applicant. The Department received a report from the issuing authority, the Directorate of Criminal Investigation (DCI) advising that the visa applicant's Kenya police clearance certificate was not genuine and that the serial number appearing on his Kenya police certificate belonged to someone else called 'Nellyjoy'. The Kenya police clearance certificate was assessed and found to be counterfeit and therefore that is a bogus document.

4. Pre hearing submissions

- 18) The review applicant provided the Tribunal with a submission dated 6 October 2020 which outlines the circumstances justifying lack of knowledge by the visa applicant regarding the bogus police certificate that was provided to him. It states that the visa applicant exercised due diligence in ensuring that he had the best chance of having his visa application granted, following the proper procedures for obtaining a valid police certificate (i.e. going through the Criminal Investigation Department (CID) in Nairobi, Kenya).
- 19) It states that the review and visa applicants received help from Bare, a taxi driver, to attain the police certificate. Bare had assisted the family previously in relation to their International Organisation for Migration (IOM) Health Assessment that they needed in order to satisfy their visa application requirements - providing transport to them, and providing assistance with translating the local language, namely Swahili (which the visa applicants cannot speak).
- 20) Mr Guled provided the following account of the events relevant to his knowledge of the validity of his police certificate. A few months after Bare helped with the ascertainment of his Health Assessment Mr Guled arranged for Bare to take him to get his police certificate. Bare offered to take him to the Criminal Investigation Department (CID) Nairobi and stated that he had helped lots of people get their police certificates in the past. On the relevant day, Bare picked up Mr Guled and took him to the Criminal Investigation Department (CID) in Nairobi. After waiting outside for some time, was met by a policeman who collected his documents and went back inside.
- 21) On Bare's instructions, Mr Guled waited a few minutes before his name was called. he was then taken to an office by a man he had not seen before. The man asked for the visa applicant to pay a sum of money, and he did so. He was then taken to another room where he saw numerous people getting their fingerprints taken. After waiting in line for a few minutes he was asked by a man to attend to a lady who was taking fingerprints, and thus proceeded to get his fingerprint taken. One week later, Mr Guled was driven by Bare back to the Criminal Investigation Department (CID) and collected his certificate. He believes that everyone he dealt with, including Bare, was honest.

22) In relation to any compelling or compassionate circumstances, the submission provides the following at paragraph 18:

- a. "The primary Applicant (referring to the review applicant's wife) and the secondary Applicant's brother-in-law live in Australia. The secondary Applicant has also his young nephew living in Australia. Therefore, it would be devastating for the pregnant primary Applicant, secondary Applicant, his brother-in-law and his young nephew, if the visa application is refused and subsequently cancelled".

5. *First hearing*

23) The review applicant stated that the Mahamud Sheikh Aydid Guled was young and didn't speak the language. He went to the Criminal Investigation Department (CID) to get the police clearance certificate. The review applicant stated that he was sending the visa applicant money and he had to organise for him to obtain the police certificate.

24) The Tribunal asked him to clarify what his role was in the visa applicant obtaining the police certificate. He responded that for this young man not knowing what to do, he guided him in relation to the right time and taking the right procedure right up until the visa applicant told him that he had arrived at the CID.

25) The Tribunal put its concerns to the review applicant in line with the requirements of s359AA of the Migration Act in that it appeared that his oral evidence was inconsistent with what he had described in written submissions. The review applicant asked how it was inconsistent. The Tribunal explained to him that what he was describing appeared to be different to the role of the taxi driver as described in the written submissions. He responded that he understood the question was about getting to the CID. He stated that he can explain the connection with the taxi driver.

26) The review applicant stated that he had the taxi driver's number and he got him to pick him up the visa applicant because he doesn't speak the language. The Tribunal asked the review applicant if he was saying he arranged for the taxi driver to take the visa applicant to the CID, and the CID issued him with a bogus document. In response he stated that the Mahamud Sheikh Aydid Guled does not read and write in English. The Tribunal repeated that it was trying to clarify his oral evidence: that is, that he arranged for the taxi driver to take the visa applicant to the CID and then the CID issued a bogus document. The Tribunal asked him why the CID would issue a bogus document. The review applicant responded that he does not know to be honest. He stated that all he knows is that Mahamud Sheikh Aydid Guled went at the right time to the right place, provided his fingerprints and was identified and when they went back, they got the documents. The review applicant stated that he wasn't there at the time.

27) The Tribunal asked about a document that was provided to the Tribunal just before the hearing and asked the applicant to explain its relevance. In doing so, the Tribunal noted that it had been claimed the visa applicant was a refugee in Kenya but that he does not have refugee status. The Tribunal put it to the review applicant that it does not understand what it is supposed to take from this document. The Tribunal was told that it was provided for the benefit of the Tribunal to understand how hard it is to be a refugee when the visa applicant he does not have official status. The Tribunal explained that it understands that, but it does not understand how it relates to the decision it needs to make as to whether a bogus document was provided in support of the visa application. The Tribunal was told they were not aware of what was given to the visa applicant and whether it was correct. The review applicant repeated that he was not there at the time;

the visa applicant was there: the visa applicant went to the right place but what happened at the CID they do not know.

6. *Oral submissions from migration representative*

- 28) The review applicant's migration representative stated that the visa applicant does not speak the language and assisted by people to obtain the police certificate and something went wrong. He submitted that the visa applicant was told that thing were done correctly. Mahamud Sheikh Aydid Guled collected the certificate and sent it in and then they were it was fake. He said they don't understand what happened and later they found that it was fake.
- 29) The migration representative also made representations regarding the broader issues regarding the situation for refugees in Kenya. He stated that the primary applicant had the same issue and stated that the Department is investigating the issue in respect of Ms Guled.

7. *Second hearing*

- 30) The Tribunal referred to the evidence provided by the review applicant at the first hearing given he indicated that he had some concerns regarding the interpreter.
- 31) The Tribunal asked him if he wished to add anything further to that evidence. The review applicant stated that previously when his wife was in Kenya she and the visa applicant had used Bare to assist them. He stated that Bare was a taxi driver. He stated that Bare has lived in Kenya for a long time and he showed them around and helped them previously. He stated they knew him but did not know he was dodgy. He stated that Bare seemed a good guy and repeated that he knew how to get around. He stated that he thinks Bare knows some people in the CID.
- 32) The Tribunal explained that requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen
- 33) The Tribunal referred to the paragraph 18 of the 6 October 2020 submission which is headed *Circumstances affecting "interests"* and states that:
8. "The primary applicant and the secondary Applicant's brother-in-law live in Australia. The secondary Applicant has also his young nephew living in Australia. Therefore, it would be devastating for the pregnant primary Applicant, secondary Applicant, his brother-in-law and his young nephew, if the visa application is refused and subsequently cancelled".
- 34) The Tribunal explained that there was nothing in that paragraph that appeared to relate to compelling circumstances that affect the interests of Australia and that it appears more relevant to the consideration as to whether there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident. The Tribunal also pointed out that there was nothing in the sub-graphs 19 (a) (e) of the submission that appeared to relate to the compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident. The review applicant was asked to comment on the Tribunal's interpretation of the submission.

- 35) The review applicant responded that it would affect the Australian community if his brother-in-law is not granted a visa because it is going to affect him and his wife and children. He stated that he is still helping him the visa applicant in Kenya. He stated that the visa applicant is alone in Kenya. He stated that his two children aged four and three months can only talk to their uncle on the phone. He stated they would love to see their uncle.
- 36) The review applicant stated his wife has medical problems after the birth of their second child. He stated the visa applicant is the only brother. He is her only relative. The Tribunal asked the review applicant about his other brother-in-law who had been originally listed as a secondary applicant on his wife's Partner visa application. He responded that they do not know where he is. He stated that he left Kenya but they don't know where he is. The review applicant stated they are very sad. He stated that the visa applicant lived with his wife during their time in Kenya. He stated that she needs some family around her. The review applicant stated that his mother and one two brothers and their families also live in Brisbane. He stated they are close, but they are all busy.
- 37) The migration representative explained that the second brother had been included as a secondary applicant on the original Partner visa application has been unable to be located. He stated that it appears that he left Kenya, but they don't know where he is.
- 38) The Tribunal was told they have been trying to do the right thing. The same situation has happened to the review applicant's wife in Kenya. He stated that it is very hard and very sad. He stated that it is affecting him and the family and is taking a toll on the review applicant.
- 39) When asked if he had any further comments, the applicant stated he does not them to be sad.
- 40) The migration representative in oral submissions stated that the review applicant would like to make further written submissions because there had been enormous change since the October 2020 submissions including the birth of a second child. When asked why further written submissions outlining the enormous changes had not been provided prior to the hearing, the migration representative stated that he was not provided with instructions. Despite his role assisting the applicant, the migration representative stated that he can only work with instructions and he only received them today. He stated that in view of the change in circumstances, something needs to be added. The Tribunal agreed that further submissions could be provided by the close of business on 19 May 2021.

9. *Post hearing submissions*

- 41) The Tribunal was provided with a number of post hearing submissions:
- a. A letter dated 19 May 2021 from a general practitioner referring the review applicant for an opinion and management. The letter states that the review applicant would like to see someone regarding his MH (mental health?) in particular depression and anxiety which is fuelled by some ongoing family issues.
 - b. A Statutory Declaration dated 24 May 2021.
 - c. Evidentiary documents in relation to the birth of the review applicant's children.
 - d. Evidence of money remitted to the visa applicant by the review applicant.

42) In the review applicant's Statutory Declaration of 24 May 2021, the review applicant stated that he believes that the circumstances of our matter are of such 'compelling' and 'compassionate' nature that his brother-in-law's visa should not be refused, given that the interests of Australian citizens/permanent residents (him, his partner, his mother and his children) and the Australian community at large would be affected and declared:

- e. He has a 13-year-old child from his previous relationship. The child often resides with him and he pays his share of child support.
- f. He and his wife married in 2012 and they have one child born in 2019 and one born in 2021.
- g. His mother who is an Australian citizen and was born in September 1960 old requires his care financially, physically and emotionally. He declared she has been diagnosed with diabetes, cholesterol issues and old age issues and that he bears the responsibility for her wellbeing, which is largely dependent on his ability to generate sufficient income.
- h. Given his financial burdens he has undertaken to start two other businesses so that he can increase his income to support my family. This has taken a significant portion of time and he is grateful to his partner being there to take care of their children
- i. Mr Guled is his partner's brother and he is very important to her. The review applicant has noticed that his partner is constantly worried for the visa applicant's wellbeing in Kenya while awaiting a decision regarding his visa. Her other brother has been missing. Her mental health is visibly declining waiting on a decision on his visa application, which has in turn has decreased her capacity to care for their children. This has meant that the review applicant has had to turn his focus away from his businesses and instead spend more time to support his partner throughout this process and help in caring for our children. Consequently, their children are also subject to the financial and emotional pressure in the circumstances.
- j. His financial capacity has decreased as a result of the above and he has been struggling financially to meet the burden of caring for his partner, his three children, his mother and the visa applicant. As a result of the stress, he have been experiencing depression and anxiety and his mental health has generally deteriorated.
- k. Because he has been suffering from depression and anxiety, it has also affected his capacity to create a stable and sufficient stream of income to support his family. He stated that he has had to undertake to start two new businesses in order to sustain a sufficient stream of income to be able to support the visa applicant in Kenya with his daily expenses, as he does not have work rights in Kenya.
- l. If the visa is granted to the visa applicant, it will allow his partner to be free from mental health issues and in turn allow him to focus more on his family. His partner is concerned is that she will lose another brother.
- m. The entirety of this situation has caused him and his family, including his partner, his children, and his mother enormous stress and mental deterioration, as they have been trying to help his brother-in-law migrate to Australia since 2014.

- n. If the visa is not granted, his Australian business will necessarily be affected, and he will have no choice but to reduce his working hours due to the ongoing depression and anxiety related to the burden financially taking care of his family.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

- 43) The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
- 44) The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
- 45) While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
- 46) The Tribunal has had regard to the Department's Decision Record which outlines that the Department undertook background checks to verify the Kenyan Police clearance certificate submitted by the visa applicant. The Directorate of Criminal Investigation (DCI) in Kenya advised that the visa applicant's Kenya police clearance certificate was not genuine and that the serial number appearing on his Kenya police certificate belonged to someone else called 'Nellyjoy'. The Kenya police clearance certificate was assessed and found to be counterfeit and therefore is a bogus document.
- 47) The Tribunal has considered the written and oral evidence by the review applicant and accepts the visa applicant used a taxi driver called Bare to assist him obtain the police certificate. The Tribunal is prepared to accept that the visa applicant unwittingly obtained a counterfeit document. However, nothing in the review applicant's evidence persuaded the Tribunal that the police certificate submitted by the visa applicant was not counterfeit.
- 48) Therefore, the Tribunal finds that whether there is evidence before the Tribunal that the applicant has given, or caused to be given, to the Minister a 'bogus document', as defined in s.5(1), i.e. a document that the Tribunal reasonably suspects is a document that
- purports to have been, but was not, issued in respect of the person, and
 - is counterfeit or has been altered by a person who does not have authority to do so, or
- 49) The Tribunal also finds that the applicant has given, or caused to be given, to the Minister 'information that is false or misleading in a material particular' at the time it was given as defined in PIC 4020(5) which was relevant to the criteria the Minister may

consider when making a decision on an application, whether or not the decision is made because of that information in relation to the visa application

50) Therefore, the applicant does not meet PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

51) The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.

52) The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.

53) For the following reasons, the Tribunal is not satisfied that the requirements should be waived.

54) In the review applicant's submission dated 6 October 2020, it was submitted that the circumstances with which the secondary visa applicant was faced with were such that they are "compelling and compassionate" to the degree that this lack of knowledge could not reasonably have been avoided – making it unfairly prejudicial to the secondary applicant, his brother-in-law, and the Australian community. It is not clear what this means. The Tribunal is prepared to accept that the Mr Guled's circumstances in Kenya as an unregistered refugee are difficult and that his lack of English language skills and lack of knowledge of how to obtain the necessary documentation as well as his trust in the taxi driver Bare and his integrity has now made it more difficult for him. However unfortunate they are, these factors do not affect the interests of Australia, nor in the Tribunal's view are they compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident

55) The main submission put forward by the review applicant in relation to the compassionate and compelling circumstances if the visa is not granted is in relation to the emotional impact on him and his family as well as the financial impact and it was submitted that there is an interplay between these factors.

56) In relation to the emotional impact the review applicant submitted that the visa applicant is alone in Kenya. He submitted and his two children aged four and three months can only talk to their uncle on the phone but that they would love to see their uncle.

57) Despite the very young ages of the review applicant's children the Tribunal accepts they would love to see their uncle. However, the Tribunal does not consider this to be a compassionate or compelling circumstance that affect the interests of an Australian citizen such that it justifies a waiver of the requirements.

58) The review applicant submitted that his wife has medical problems after the birth of their second child. He stated the visa applicant is her only relative and he is very important to her. He submitted that he has noticed that she is constantly worried about the visa

applicant's wellbeing and that her mental health is visibly declining waiting on a decision on his visa application

- 59) In relation to the financial impact, the review applicant stated that he is still helping him Mr Guled in Kenya as well as his a 13-year-old child from his previous relationship, and also supporting his mother, his wife and children. In addition, he submitted that his mother has various medical conditions and her wellbeing is largely dependent on his ability to generate sufficient income. He referred to undertakings to start two other businesses to enable him to increase his income to support his family and that this relies on his partner being there to take care of their children
- 60) With his partner's mental health deteriorating, it has decreased her capacity to care for their children which has resulted in him turning his focus away from his businesses and instead spending more time to support his partner throughout this process and help in caring for their children. Consequently, his financial position has worsened, and their children are also subject to the financial and emotional pressure in the circumstances.
- 61) In relation to the claims made in relation to the review applicant's wife's health, the Tribunal has taken account of the medical evidence provided to the Tribunal. The Tribunal accepts that she had a moderate-risk singleton pregnancy and that she gave birth to her second child in late January, and that she was not in a position to provide oral evidence at the hearing. No evidence was provided in relation to her mental health although the Tribunal accepts that she is worried about the well-being of the visa applicant. No evidence was submitted in relation to Ms Guled's mental health or her reduced capacity to care for the couple's young children. The Tribunal therefore does not accept that his wife's mental health provides a compassionate and compelling circumstance to justify a waiver of the requirements.
- 62) The review applicant submitted he has been experiencing depression and anxiety and his mental health has generally deteriorated which has also affected his capacity to create a stable and sufficient stream of income to support his family. He submitted that if the visa is not granted, his Australian business will necessarily be affected, and he will have no choice but to reduce his working hours due to the ongoing depression and anxiety related to the burden financially taking care of his family.
- 63) In relation to the review applicant's claims regarding his mental health, the Tribunal has had regard to the referral letter of 19 May 2021 from his GP. The Tribunal notes that it is dated after the second hearing. The Tribunal is concerned that it was sought in an effort to establish a compassionate and compelling circumstances following the hearing. Further, the Tribunal notes that there is no diagnosis of depression or anxiety in the letter from the GP. On that basis, the Tribunal does not accept the review applicant the review applicant's mental health justifies a waiver of the requirements.
- 64) While the Tribunal accepts that the situation regarding Mr Guled's current position and the problems that have arisen regarding the bogus police certificate are extremely stressful for the family, based on the evidence provided the Tribunal does not accept that the stress caused for either the review applicant or his wife is a reason which justifies a waiver of the requirements. The Tribunal is very sympathetic to how they are feeling and appreciates that their reactions to the situation are to be expected.
- 65) The Tribunal is prepared to accept that the review applicant is financially supporting his family, his mother and the visa applicant. No evidence was presented in regard to the deterioration of his financial position or that his financial position has worsened as a result of the situation faced by the family. Therefore, based on the evidence provided to

the Tribunal, it did not find that his claims regarding the impact on his finances were a reason to justify a waiver of the requirements.

- 66) Having considered the totality of the evidence provided by the review applicant in regard to whether the requirements of PIC 4020(1) should may be waived, the Tribunal is not satisfied that the evidence provided substantiates the existence of compassionate or compelling circumstances that affect the interests of an Australian citizen or an Australian permanent resident that justify the granting of the visa. Therefore the requirements of PIC 4020 (1) should not be waived.

10. **Conclusions**

- 67) On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl.309.323.
- 68) Based on the evidence provided the Tribunal is not satisfied that the applicant meets the criteria for any other subclass within the class of visa sought.

DECISION

- 69) The Tribunal affirms the decision not to grant the applicant a Partner (Provisional) (Class UF) visa.

Linda Holub
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...